SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 635

ROBERT VINCENT GARDNER,

Appellant,

—v.—

VINCENT L. BRODERICK, as Police Commissioner of the City of New York, and THE CITY OF NEW YORK,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR APPELLANT

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Opinion Below

The only opinion by any Court below is that of the New York Court of Appeals reported in 20 N. Y. 2d 227, 229 N. E. 2d 184.

Jurisdiction

Jurisdiction of this Court is invoked by 28 U. S. C. §1257(2) in that there was drawn in question below the validity of Article I, Section 6 of the New York State Constitution and Section 1123 of the New York City Char-

ter on the ground that they were repugnant to the United States Constitution and the decision was in favor of their validity. The decision below was on July 7, 1967; notice of appeal to this Court was served on August 1, 1967; the jurisdictional statement was filed in this Court on September 19, 1967; probable jurisdiction was noted on January 29, 1968 and the case was placed on the summary calendar.

Statutes Involved

The texts of all sections of statutes are set forth in full in the appendix to this brief.

New York State Constitution, Article I, §6, *Manuel For The Use of The Legislature of the State of New York,* 1966-1967, p. 16 (John P. Lomenzo, Secretary of State, Albany, N. Y.); *McKinney's Laws of New York Annotated,* Book 2 Part 1, Constitution pp. 12-13 of 1967 Pocket Supplement (Edward Thompson Company, Brooklyn, N. Y.).

New York City Charter §1123, *New York City Charter and Administrative Code Annotated,* Vol. 1 p. 30 (Williams Press, Inc., Albany, N. Y. 1963).

Laws, 1940, Ch. 834, *Laws of the State of New York, 1940,* Ch. 834, p. 2098 (J. B. Lyon Co. Printers, Albany, N. Y., 1940); *McKinney's Laws of New York Annotated,* Book 65 Part 1, Unconsolidated Laws, Ch. 9, §891, p. 32 (Edward Thompson Co. Brooklyn, N. Y. 1949).

Civil Service Law §75(2), *Laws of the State of New York, 1960,* Ch. 312, p. 1165; *McKinney's Laws of New York Annotated,* Book 9, Civil Service Law, pp. 45-46 1967 Pocket Supplement (Edward Thompson Co. Brooklyn, N. Y.).

Questions Presented for Review

"Is Article I Section 6 of the New York State Constitution and is Section 1123 of the New York City Charter repugnant to the United States Constitution in that any public officer who refuses to sign a waiver of immunity and claims a privilege against self-incrimination suffers a penalty of loss of his position and is barred from public employment for five years under the New York State Constitution and forever under the New York City Charter?

"Is a suspended police officer under departmental charges who is subpoenaed before a grand jury inquiring into the substance encompassed in those departmental charges legally before said grand jury? Is his refusal to sign a waiver of immunity under such circumstances an act of misconduct justifying dismissal? Does his dismissal deprive him of equal protection of the laws and violate his privilege against self-incrimination?"

Statement of the Case

The Appellant is a forty-three-year-old Patrolman appointed on October 1, 1949, to the New York City Police force after competitive examination, and is an honorably discharged veteran of the Navy with wartime service (A3). On August 4, 1965, he was served by the Police Department with two charges of misconduct alleging conspiracy to violate the gambling laws of the State of New York and was suspended (A48, A22). The next day, August 5, 1965 and the following day, August 6, 1965, the Appellant

appeared pursuant to subpoena before the New York County Grand Jury (A11, A12, A19). Each time the Appellant was informed that the Grand Jury was conducting an investigation to determine whether a conspiracy was in existence between various members of the Police Department and various gamblers to bribe police officers and violate gambling laws (A13, A20). On both occasions he was requested to sign a waiver of immunity and testify pursuant to the City Charter and State Constitution (A16, A21). At the August 5th appearance, he was directed to return on August 6, 1965 and the Appellant requested another date to return because he was scheduled to appear in the Police Department trial room on the existing charges on August 6, 1965 and was "fighting for my job" on that date (A17); the request for an adjournment was denied. When he returned on August 6, 1965 he declined to sign a waiver of immunity, stating that since he was a target of the investigation, there was no authority on the part of the Grand Jury to subpoena and question him (A21). He was thereupon excused. On the same day, August 6, 1965, the District Attorney wrote to the Police Commissioner to report the refusal to sign a waiver and further stated that since it was not the intention of the Grand Jury to confer immunity, the Appellant was not questioned (A11-A12). A separate charge of misconduct, refusal to sign a waiver of immunity before the Grand Jury, was served upon the Appellant and he was ordered to report for a hearing on that charge on August 10, 1965 (A22). On August 10, 1965 a hearing was held on the one charge of refusal to sign a waiver of immunity; a demand by Appellant that all three charges then existing be tried was denied (A25-A26). The Assistant District Attorney testified that the Grand Jury was investigating crimes of bribery by

gamblers of police officers (A28); that the Grand Jury wished to question him concerning the conduct of his office and was asked to sign a waiver of immunity (A28); and that the Appellant refused stating it was inappropriate because he was a target of the investigation (A28); the minutes of the appearances were then placed into evidence (A29). On cross examination the witness testified that the Appellant was a possible defendant in the Grand Jury inquiry (A30-A31). A motion to dismiss on the ground that the Appellant was a target of the Grand Jury investigation and hence was illegally subpoenaed was made at the close of the case (A32), and decision was reserved. The next day, August 11, 1965, the Appellant was dismissed solely for his refusal to sign a waiver of immunity (A34). No disposition of the remaining charges was made. Thereafter a petition to the Supreme Court was served requesting reinstatement and full back pay on the ground that the Appellant was illegally dismissed in violation of constitutional rights (A4). The answer and return set forth the basis of dismissal—refusal to sign a waiver of immunity as required by the City Charter and State Constitution (A6-A8). The Appellant's reply thereto alleged that he had not been convicted of any act of misconduct or incompetence because such requirements of office were unconstitutional (A36). The Appellate Division of the Supreme Court confirmed the Appellees' determination without opinion (A37-A38). The Court of Appeals unanimously affirmed (A45-A47) with an opinion by Fuld, J. (A41-A45). On appeal to this Court, probable jurisdiction was noted January 29, 1968 (A53).

ARGUMENT

State requirements of public office which require a waiver of the right against self-incrimination guaranteed by the United States constitution, upon pain of dismissal, are unconstitutional; the refusal of a state employee to waive immunity under such circumstances is not an act of misconduct justifying dismissal; calling a public officer before the Grand Jury to execute such waiver when he is a target of the investigation is illegal and all consequences flowing therefrom are similarly illegal.

The Fourteenth Amendment secures against state invasion, the same privilege that the Fifth Amendment secures against federal infringement—the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will and to suffer no penalty for such silence. *Malloy* v. *Hogan,* 378 U. S. 1, 8; *Griffin* v. *California,* 380 U. S. 609, 613. Neither the Fourteenth Amendment nor the Fifth Amendment have any proviso excluding public officers from the full benefit of the rights conferred therein. The two sections of law under review, Article I, Section 6 of the *New York Constitution* and Section 1123 of the *New York City Charter* seek by their terms to except public officers from the full protection of the Federal Constitution. The Court of Appeals of the State of New York, in the opinion in this case stated, "It is clear, and was so understood by the petitioner, that section 1123 of the Charter required him, as a condition of his continued employment by the police department, to waive his constitutional privilege against self-incrimination, and to answer questions regarding the conduct of

his office and the performance of his official duties" (A42-A43). The sections of law under review thus use the threat of loss of employment against the assertion of constitutional privilege. This attempt by the state to add a proviso to federally protected liberties must be declared unconstitutional in that it violates supremacy of federal law. *Marbury* v. *Madison,* 1 Cranch (U. S.) 137; *United States Constitution,* Art. VI, Sec. 2. The threat of loss of employment unless the public officer waives a constitutionally conferred privilege is coercion which is a fetter on free speech and the testimony extracted thereby is compelled testimony. *Garrity* v. *New Jersey,* 385 U. S. 493. The Bill of Rights protects against criminal and quasi-criminal civil punishment. *Garrity* v. *New Jersey, supra* (use in criminal prosecution); *United States* v. *Lovett,* 328 U. S. 303, 316 (loss of pay and position); *Boyd* v. *United States,* 116 U. S. 616; *Plymouth Sedan* v. *Pennsylvania,* 380 U. S. 693 (both involving forfeiture of goods); *Schlochower* v. *Bd. of Education,* 350 U. S. 551 (administrative dismissal from public office); *Steinberg* v. *United States,* 141 Ct. Cl. 1, 163 F. Supp. 590, cited with approval in *Sherbert* v. *Verner,* 374 U. S. 398, 404, n. 6 (loss of federal vested pension rights); *Spevack* v. *Klein,* 385 U. S. 551 (disbarment). The opinion of the New York Court of Appeals in the case at bar recognized that the holding of *Garrity* undoubtedly partially invalidated the sections under review insofar as they permit testimony gained thereunder to be used in a criminal prosecution, but went on to say that the testimony could be used to support an act of misconduct justifying dismissal (A43). However, it is the method of attainment which taints the testimony as compelled. The changing of the use of that testimony from criminal to administrative hearings does

not make it any less compelled. A threat of loss of one's livelihood is a fetter on free speech and the choice to speak under such circumstances is not a free choice. *Garrity* v. *New Jersey, supra.* Freedom of choice does not mean being subjected to alternatives, each of which carries potential adverse consequences to the person making the choice. *Union Pacific Ry. Co.* v. *Public Service Commission,* 248 U. S. 67; *Frost* v. *Railroad Commission,* 271 U. S. 583; *Baggett* v. *Bullett,* 377 U. S. 360. Thus the alternative of being subjected to consequences of loss of employment unless he waives a constitutionally protected right is an alternative which does not secure the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will and to suffer no penalty for such silence. *Malloy* v. *Hogan, supra.*

It is therefore abundantly clear that the sections under review are unconstitutional. The Court of Appeals of the State of New York in its opinion found no constitutional defect in the statutes as it applied to the Appellant (A43), in spite of the fact that the Appellant was dismissed solely for refusal to sign the waiver of immunity which is an act of asserting the privilege (A41-A43). Nowhere in the Record was it suggested to the Appellant that the testimony which he was asked to give was not going to be used in a criminal proceeding against him. In fact he was informed that the investigation was a criminal one and that his conduct was being inquired into and he was asked to waive immunity (A20-A21). In addition, the sections under review, authorizing the request for waiver are cast in terms of and contemplate criminal prosecution. At no time was Appellant informed that the testimony would not be used against him criminally and used only adminis-

tratively. The Court of Appeals of New York in its opinion indicates that the question of the constitutionality of the sections under review, "may still be an open one" (A43), citing *Stevens* v. *Marks,* 383 U. S. 234, 243 and *Spevack* v. *Klein, supra,* yet countenances by affirmation the dismissal of this Appellant for a course of action which is consistent with a good faith recognition of the questionability of the sections. Such good faith action should not result in a finding of misconduct justifying punishment. See: *In the Matter of the Investigation Into Alleged Commission of Criminal Abortions in the County of Kings,* 206 Misc. 830, aff'd 286 App. Div. 270, lv. to app. den. 309 N. Y. 1031, 135 N. Y. S. 2d 381, aff'd 143 N. Y. S. 2d 501.

It has been suggested that a public officer has a duty to account to the state for the conduct of his office, and the failure to do so is insubordination and misconduct. *Spevack* v. *Klein, supra* (concurring opinion per Fortas, J. at 385 U. S. 511, 520). The advance relinquishment of constitutional guarantees is not an essential prerequisite to such duty as may exist. A public officer can account for his actions without the necessity of waiving his privilege just as any other individual can. See: *Matter of Grae,* 282 N. Y. 428, 26 N. E. 2d 963. A major consideration is who is doing the questioning and what is the status of the officer being questioned, and for what purpose will the results of the examination be used. An officer on active duty who is not under charges of misconduct and who is being questioned by his natural superior, such as a commissioner of the department, is in an entirely different category than one who is being questioned by the commissioner or Grand Jury after he is under departmental charges, wherein his superior has become his judge, and the officer

has a right to assume a defensive posture best calculated by him to resist and defeat the existing charges, including silence at his own removal hearing. *Schawecker* v. *Green*, 96 App. Div. 249, 254, 89 N. Y. S. 343. Once charges are served the burden of proof of misconduct is upon the party alleging them and the device of extracting testimony from the accused under threat of loss of employment would shift the burden of proof upon the accused. *Laws, 1940*, Ch. 834; *Civil Service Law*, Sec. 75. Even were he not under existing charges, if the inquiry is made by the Grand Jury—which is not his natural superior—and he is asked to account for his actions upon threat of removal unless he waives his constitutional privilege, it is not an act of misconduct for him to refuse to do so. The Grand Jury is not the Commissioner. Unlike the Commissioner, it has contempt of Court powers and powers to indict for perjury, which powers are sometimes used to secure imprisonment of the witness by use of procedural devices to overcome the lack of substantive proof of the crime being investigated. Obscure questions, the answers to which may in good faith be unknown to the witness, or the impression that a district attorney may have that the witness is being evasive, subject the witness to the harassment expense to defend ill-founded indictments for perjury or contempt of court, and danger of imprisonment. See: e.g. *Stevens* v. *Marks*, 383 U. S. 234. A Civil Service employee in the competitive class is a protected employee. Unlike a private employer who can arbitrarily or unreasonably discharge a private employee, the state or city is held to a degree of procedure embodied in *Civil Service Law*, Sec. 75 and *Laws, 1940*, Ch. 834, which are consistent with due process of law. This is necessary because the Fourteenth Amendment protects against state rather than private action.

Moreover, the opinion of the Court of Appeals of New York deprives Appellant of equal protection of the laws, in that the New York State Legislature has specifically provided that a police officer can only be dismissed after a hearing on stated charges with a right to counsel with the burden of proving the misconduct to be upon the Department. *Laws, 1940,* Ch. 837; *Civil Service Law,* Sec. 75. By compelling the Appellant, who was then under departmental charges encompassing the same area of Grand Jury inquiry (A48, A41, A13, A20, A11), to testify upon threat of dismissal, and then to use any testimony relating to misconduct against the officer in his own removal hearing as suggested by the Opinion below (A43), the result would shift the burden of proof upon the accused from the accuser, without introduction of extrinsic evidence independently gathered. This procedure violates the requirements of proof by the accuser. It also violates the basic concepts of due process of law guaranteed by the Fourteenth Amendment because other officers enjoy the protection of the Civil Service sections cited whereas those in Appellant's position do not. The introduction of such testimony at the removal hearing is contrary to the holding that a civil service employee need not testify at his own removal hearing because his superior has changed roles to that of his judge. *Schawecker* v. *Green,* 96 App. Div. 249, 254, 89 N. Y. S. 343. The effect of the opinion is to overrule this concept of due process of law, making an accusatorial system into an inquisitional one. See: *Murphy* v. *Waterfront Comm'n,* 378 U. S. 52, 55.

The decision below also disregards the fact that the Appellant herein was illegally subpoenaed before the Grand Jury in the first place, and that all consequences flowing

therefrom are illegal. The Appellant was suspended and under departmental charges of conspiracy to violate the gambling laws and to commit bribery (A48, A22), at the time he was subpoenaed before the Grand Jury. While before the Grand Jury he was informed that the Grand Jury was conducting an investigation to determine whether the crimes of conspiracy to violate the gambling laws and to commit bribery were in existence (A13, A20). He thereupon was requested to sign a waiver of immunity and to testify as to his conduct of his office (A16, A21), at a time when he was "fighting for my job in the Police Department at the trial room" (A17). These facts lead to the inescapable conclusion that at the time he was subpoenaed before the Grand Jury Appellant was a target of the Grand Jury investigation, a conclusion which was confirmed by the Assistant District Attorney at the Departmental Hearing wherein the Appellant was described as a potential defendant of the investigation (A30-A31). At the Grand Jury hearing, Appellant explained his refusal to sign the waiver of immunity by stating that since he was a target of the investigation, there was no authority to subpoena and question him (A21). This explanation was repeated in the Departmental hearing by way of motion to dismiss the charge on the ground that Appellant's appearance before the Grand Jury was illegal because the authority of the Grand Jury to subpoena is limited to witnesses who are in truth and fact witnesses and not to targets of the investigation, citing *People* v. *Steuding,* 6 N. Y. 2d 214, 160 N. E. 2d 468. This contention is also supported by *Matter of Bernoff* v. *Amoroso,* 188 Misc. 845, aff'd 271 App. Div. 925, 65 N. Y. S. 2d 810, aff'd 67 N. Y. S. 2d 701 wherein the court stated at 188 Misc. 845, 847:

"* * * Attendance of persons before a grand jury is governed exclusively by §609 of the Code of Criminal Procedure which authorizes the District Attorney to issue subpoenas for 'witnesses' to appear before the grand jury, upon an investigation pending before them.' This is the only provision of law which empowers the district attorney to compel the appearance of a person before the grand jury. * * * Section 609 specifically limits persons for whom subpoenas may be issued to 'witnesses'. The generic term 'persons' is not used. This is clear recognition of the distinction which exists between persons who are the objects of grand jury inquiry and 'witnesses'. Accordingly the grant of power to subpoena persons to appear before a grand jury is limited to 'witnesses.' * * *"

Because Appellant was a target of the investigation, he was illegally before the Grand Jury and all consequences flowing therefrom were illegal. To give effect to consequences flowing therefrom deprived Appellant of equal protection of the laws, in that persons in his group—targets of the investigation—are excluded from the power of the Grand Jury to subpoena, and Appellant was not so excluded. The Department also denied a demand that the two existing substantive charges be tried at once together with the additional charge of refusal to sign a waiver of immunity. The demand was denied (A25-A26, A6). Thus Appellant was dismissed solely for invoking his constitutional privilege without any evidence of substantive acts of misconduct as a legal residuum. The Department used a procedural device employing deprivation of constitutional liberty to overcome its lack of substantive evidence of misconduct. The refusal of the Department to accord a speedy and immedi-

ate trial of the existing charges also constituted a deprivation of due process of law.

The practical results of the procedures followed in this case are a graphic portrayal of what happens when a state seeks to disregard constitutional liberties and employ force, fear and threats to extract information from an accused rather than employ skillful investigative techniques leading to independent extrinsic evidence. All that the Appellant's family, friends and prospective employers know is that the Appellant was dismissed from the department while serious charges of substantive misconduct were made against him. They cannot know that he was never convicted of any substantive wrongdoing without a careful study of the procedures and nuances of this case. He has been punished to the full extent under sections of law whose legality is termed open to question by the Court of Appeals of New York, which laws seek to dilute protected federal privileges of public officers. This procedural device has been used to overcome an apparent lack of evidence of the substantive charges of misconduct which the Department refused to try, although trial was duly demanded. These results are inconsistent with constitutional liberties.

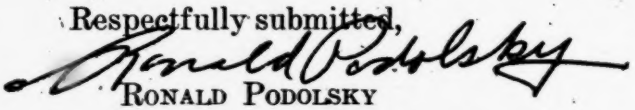
The privilege against self-incrimination is a constitutional guaranty of a fundamental personal right. Long regarded as a safeguard of civil liberty, it was firmly imbedded in the law of England and by the Fifth Amendment to the Federal Constitution became a basic principle of American constitutional law. "It is a barrier interposed between the individual and the power of the government, a barrier interposed by the sovereign people of the State; and neither legislators nor judges are free to overleap it." *Matter of Doyle,* 257 N. Y. 244, 250. When the Appellant

as a witness upon the inquiry at the Grand Jury declined to sign a waiver of immunity and thus refused to relinquish in advance a privilege which the Constitution guarantees to him, he was within his legal right. The constitutional privilege is a fundamental right; its exercise cannot be a breach of duty. It follows that, upon the facts disclosed by the record, the finding of the disciplinary proceeding against the Appellant, wherein the single offense charged was his refusal to yield a constitutional privilege, was not warranted as a finding of misconduct. See *Matter of Grae,* 282 N. Y. 428, 26 N. E. 2d 963. Hence the Appellant was never convicted of any justiciable act of misconduct and he should be restored to his position with back pay.

CONCLUSION

Article I, Section 6 of the *New York State Constitution* and Section 1123 of the *New York City Charter* are unconstitutional; Appellant was never convicted of any justiciable act of misconduct; the court below should be reversed and the appellant restored to his position with full back pay.

Respectfully submitted,



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APPENDIX TO THE BRIEF

New York State Constitution, Article I, §6

New York State Constitution, Article I, §6, reads,

[Grand jury; protection of certain enumerated rights; duty of public officers to sign waiver of immunity and give testimony; penalty for refusal.] §6. No person shall be held to answer for a capital or otherwise infamous crime (except in cases of impeachment, and in cases of militia when in actual service, and the land, air and naval forces in time of war, or which this state may keep with the consent of congress in time of peace, and in cases of petit larceny, under the regulation of the legislature), unless on indictment of a grand jury, and in any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions and shall be informed of the nature and cause of the accusation and be confronted with the witnesses against him. No person shall be subject to be twice put in jeopardy for the same offense; nor shall he be compelled in any criminal case to be a witness against himself, providing, that any public officer who, upon being called before a grand jury to testify concerning the conduct of his present office or of any public office held by him within five years prior to such grand jury call to testify, or the performance of his official duties in any such present or prior offices, refuses to sign a waiver of immunity against subsequent criminal prosecution, or to answer any relevant question concerning such matters before such grand jury, shall by virtue of such refusal, be disqualified from holding any other public office or public employment for a period of five years from the date of

such refusal to sign a waiver of immunity against subsequent prosecution, or to answer any relevant question concerning such matters before such grand jury, and shall be removed from his present office by the appropriate authority or shall forfeit his present office at the suit of the attorney-general.

The power of grand juries to inquire into the wilful misconduct in office of public officers, and to find indictments or to direct the filing of informations in connection with such inquiries, shall never be suspended or impaired by law.

No person shall be deprived of life, liberty or property without due process of law. (Amended by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938; further amended by vote of the people November 8, 1949; November 3, 1959.)

New York City Charter, §1123

New York City Charter, §1123 reads;

§1123. Failure to testify.—If any councilman or other officer or employee of the city shall, after lawful notice or process, wilfully refuse or fail to appear before any court or judge, any legislative committee, or any officer, board or body authorized to conduct any hearing or inquiry, or having appeared shall refuse to testify or to answer any question regarding the property, government or affairs of the city or of any county included within its territorial limits. or regarding the nomination, election, appointment or official conduct of any officer or employee of the city of any such county, on the ground that his answer would tend to incriminate him, or shall refuse to waive immunity from prosecution on account of any such matter in relation to which he may be asked to testify upon any such hearing or

inquiry, his term or tenure of office or employment shall terminate and such office or employment shall be vacant, and he shall not be eligible to election or appointment to any office or employment under the city or any agency. (Derived from former §903.)

Laws, 1940, Ch. 834

Laws, 1940, Ch. 834 reads:

Section 1. Removal of policemen serving in the competitive class of civil service in the several cities, counties, towns and villages of the state. A policeman serving in the competitive class of civil service in any city, county, town or village of the state, any provision of law, rule or regulation to the contrary notwithstanding, shall not be removed from his position except for incompetency or misconduct shown after a hearing upon due notice upon stated charges, and with the right to such policeman to be represented by counsel at such hearing and to a judicial review in accordance with the provisions of article seventy-eight of the civil practice act. The burden of proving incompetency or misconduct shall be upon the person alleging the same. Hearings upon charges pursuant to this act shall be held by the officer or body having the power to remove the person charged with incompetency or misconduct or by a deputy or other employee of such officer or body designated in writing for that purpose. In case a deputy or other employee is so designated, he shall, for the purpose of such hearing, be vested with all the powers of such officer or body, and shall make a record of such hearing which shall, with his recommendations, be referred to such officer or body for review and decision.

§2. This act shall take effect immediately.

Civil Service Law §75(2)

Civil Service Law §75(2) reads:

Section 1. Subdivision two of section seventy-five of the civil service law, as added by chapter seven hundred ninety of the laws of nineteen hundred fifty-eight, is hereby amended to read as follows:

2. Procedure. A person against whom removal or other disciplinary action is proposed shall have written notice thereof and of the reasons therefor, shall be furnished a copy of the charges preferred against him and shall be allowed at least eight days for answering the same in writing. The hearing upon such charges shall be held by the officer or body having the power to remove the person against whom such charges are preferred, or by a deputy or other [employee of] *person designated by* such officer or body [designated] in writing for that purpose. In case a deputy or other [employee] *person* is so designated, he shall, for the purpose of such hearing, be vested with all the powers of such officer or body and shall make a record of such hearing which shall, with his recommendations, be referred to such officer or body for review and decision. The person or persons holding such hearing shall, upon the request of the person against whom charges are preferred, permit him to be represented by counsel, and shall allow him to summon witnesses in his behalf. The burden of proving incompetency or misconduct shall be upon the person alleging the same. Compliance with technical rules of evidence shall not be required.

§2. This act shall take effect immediately.

EXPLANATION—Matter in *italics* is new; matter in brackets [ ] is old law to be omitted.